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IN THE UNITED STATES DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

Civil Action No. 2004

RED BALL MOTOR FREIGHT, INC., ET AL.,
Plaintiffs,

vs.

HERRIN TRANSPORTATION COMPANY, ET AL.,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

Copies of the Opinion of the District Court for the Northern District of Texas, Fort Worth Division, Findings of Fact, Conclusions of Law, and Judgment are attached hereto as Appendix A.

Jurisdiction

The Judgment of the District Court was entered on February 8, 1951. A Petition for Appeal is presented to the

District Court herewith, to-wit, on March 28, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustained the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Capital Transit Company,* 325 U.S. 357; *United States* v. *Detroit and Cleveland Navigation Company,* 326 U.S. 236; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515.

Questions Presented

(1) Whether there is substantial evidence in the record before the Interstate Commerce Commission that Herrin Transportation Company was an effective competitor in its bid for a part of the traffic between Dallas, Texas, and Shreveport, Louisiana, prior to the grant of the involved certificate, when the record shows that Herrin Transportation Company had to transport such traffic over a circuitous route via DeRidder, Louisiana.

(2) Whether the trial court erred in dismissing plaintiffs' petition to enjoin, set aside and annul the order of the Interstate Commerce Commission.

(3) Whether the trial court erred in failing and refusing to grant the prayer of plaintiffs' petition to enjoin, set aside and annul the order of the Interstate Commerce Commission.

Statutes Involved

Sections 206 and 207 of the Interstate Commerce Act, as amended (49 U.S.C.A. 306 and 307), and Section 10 (e), Administrative Procedure Act (5 U.S.C.A. 1009 (e)), are set forth in Appendix B hereto.

Statement

Appellants Red Ball Motor Freight, Inc., D. C. Hall Transport, Inc. and East Texas Motor Freight Lines are each common carriers by motor vehicle, authorized to transport general commodities, with exceptions, between various points, including Dallas, Texas, and Shreveport, Louisiana, over U. S. Highway No. 80. Appellants East Texas Motor Freight Lines and Red Ball Motor Freight, Inc. similarly operate between Dallas, Texas, and Lufkin, Texas, over U. S. Highway No. 175. Appellant Red Ball Motor Freight, Inc. also operates between Houston and Shreveport serving intermediate points including Lufkin, over the same route over which the Appellant Herrin Transportation Company operates. Appellant East Texas Motor Freight Lines also operates between Lufkin and Houston over the same route over which the Appellee Herrin operates, serving intermediate points.

Long prior to any action involved in this cause, the Interstate Commerce Commission granted its Certificate of Public Convenience and Necessity No. MC-1124 to Appellee Herrin Transportation Company (hereinafter called "Herrin"), authorizing the transportation of general commodities, with exceptions, as a common carrier by motor vehicle in interstate or foreign commerce, over numerous regular routes in Texas and Louisiana, including (a) between Houston, Texas, and New Orleans, Louisiana; (b) between Houston, Texas, and Shreveport, Louisiana, serving intermediate points including Lufkin; (c) between Corsicana, Texas, and DeRidder, Louisiana, serving no intermediate points except Merryville as an intermediate point, with no service authorized at Corsicana, and service at DeRidder restricted to traffic moving to and from Merryville and Dallas, Texas, and points beyond Dallas; (d)

between Galveston, Texas, and Fort Worth, Texas, (through Houston, Corsicana, and Dallas) with service, so far as relevant here, authorized to and from Dallas and Houston; and (e) between Lake Charles, Louisiana, and Shreveport, Louisiana, through DeRidder.

In MC-1124 Sub. No. 6, the Interstate Commerce Commision authorized the service between Corsicana and DeRidder over the route and with the restrictions hereinabove noted. In the report of Division 5 of the Interstate Commerce Commission in connection therewith, *Herrin Transportation Co. Extension—DeRidder—Corsicana,* 34 M.C.C. 750, at 753 it was stated:

> "Applicant does not at present serve Corsicana, Jasper or DeRidder; and, with the exception of shipments between Dallas and points beyond, on the one hand, and DeRidder on the other, there is no evidence of any inadequacy of transportation facilities at those points. Accordingly, without exception, the application to serve those points must be denied. Applicant now serves Lufkin from Houston and Shreveport, but presented no evidence of any existing need for additional service from Dallas and New Orleans. This portion of the application should be denied."

On June 24, 1947, Herrin filed a petition with the Interstate Commerce Commission requesting interpretation of its certificates and a finding that applicant might transport general commodities, with certain exceptions, between Dallas, Texas, and Shreveport, Louisiana, via Lufkin, Texas. On September 4, 1947, the Interstate Commerce Commission, in denying such petition, ordered:

> "*It is ordered,* that said Herrin Transportation Company, a Corporation, Houston, Texas, be, and it is hereby, notified that it may not lawfully transport traffic between Dallas, Texas, and Shreveport, Louisiana, by a joinder of the two routes described above at Lufkin."

The report and order of Division 5 of January 14, 1948 in MC-1124 Sub. No. 57, *Herrin Transportation Company—Extension—Dallas, Texas, and Shreveport, Louisiana*, 47 M.C.C. 826 (not fully reported), denied the application and found that public convenience and necessity did not require operation by applicant as a common carrier of general commodities between Dallas and Shreveport over U. S. Highway No. 80, finding, among other things:

> "Applicant may not lawfully operate between Dallas and Shreveport by a joinder of routes described above at Lufkin."

Thereafter by application filed with the Interstate Commerce Commission on December 22, 1947, in its Docket No. MC-1124 Sub. No. 61, Herrin Transportation Company sought authority to serve Lufkin as an intermediate point in connection with its then authorized operations between Dallas, Texas, and DeRidder, Louisiana. Hearings on the application were held on April 15 and June 18, 1948 at Fort Worth, Texas, before an examiner of the Interstate Commerce Commission, who, pursuant to the provisions of the Interstate Commerce Act, on August 18, 1948, served a recommended report and order, which report and order recommended the grant of the application so as to amend Certificate No. MC-1124 "so as to authorize in addition service at Lufkin, Texas, as an intermediate point on the route described therein, restricted against traffic moving between Dallas, Texas, and Shreveport, Louisiana."

Exceptions to such recommended report and order were filed by Herrin and by appellants and replies to such exceptions were filed on behalf of Herrin and appellants herein, respectively. Thereafter the Interstate Commerce Commission, Division 5, issued the report and order of September 19, 1949 herein complained of. Appellants filed petitions for reconsideration and oral argument seeking the reversal

of the report and order of the Interstate Commerce Commission, Division 5, of September 19, 1949, and thereafter the Interstate Commerce Commission issued its order of May 4, 1950, herein complained of also.

No evidence was offered at the hearing before the Interstate Commerce Commission relating to any need for any new or additional motor carrier service between Dallas and Shreveport nor between Dallas and Lufkin. The only evidence offered relating to public need related to service between Lufkin, Texas, on the one hand, and, on the other, DeRidder and New Orleans, Louisiana. Herrin's operating witness was not familiar with the approximate volume of traffic that his company was handling over the route. On the other hand, operating witnesses of appellants testified that the granting to Herrin of service over the more direct route between Dallas and Shreveport would afford unto Herrin a competitive advantage in the solicitation and securing of freight tonnage which otherwise they would not be able to obtain and that as a result of the granting of such application it would establish Herrin as a substantial competitor for freight tonnage between Dallas and Shreveport, which effect did not exist prior to the grant of such authority.

Appellants brought this action in the United States District Court for the Northern District of Texas, Fort Worth Division, under Title 28, United States Code, Sections 1337, 1398, et seq., and Title 5, United States Code, Section 1009, appealing from such orders of the Commission. The District Court, Judge Dooley dissenting, refused to set aside the reports and orders of the Commission and in the majority opinion found, in effect, that the Interstate Commerce Commission having found that the public convenience and necessity required the proposed operations, the Court should not substitute its judgment for that of the Commission.

The Questions Are Substantial

The question involved in this appeal is not frivolous, and no intent is had nor purpose to be served of delay by prosecuting this appeal, inasmuch as Herrin is now conducting the operation complained of. The matter of primary concern in this appeal is one of substantial evidence: Whether by proof of the matter relating to a part of the application, the balance of the application may be granted without regard as to substantial evidence; whether by the filing of an application between two points and offering of proof in connection therewith a new service may be authorized to be set up between other points without proof therefor; whether without substantial evidence an order may be allowed to stand authorizing service between two points not directly applied for. The action of the Interstate Commerce Commission in granting the considered application and in issuing the orders complained of (a) authorizing Herrin to institute a new motor carrier service between Dallas and Lufkin (and points beyond Lufkin, including Shreveport, by connection at Lufkin), and (b) authorizing Herrin to institute a new service at Lufkin in connection with the Dallas-DeRidder Route, was arbitrary and erroneous, and transcends the legitimate bounds of the Interstate Commerce Commission's authority for the following reasons: (1) There was no evidence before the Interstate Commerce Commission with respect to any need or requirement for any service between Dallas and Lufkin (and points beyond Lufkin); (2) The evidence before the Interstate Commerce Commission is undisputed that the existing carrier service between Dallas and Lufkin (and points beyond Lufkin) is adequate to meet the public needs and convenience and that there is no public necessity nor requirement for the additional service authorized to the applicant to perform

between Dallas and Lufkin (and points beyond Lufkin); (3) The only evidence before the Interstate Commerce Commission relating to any transportation desired by anyone related to service between Lufkin and De Ridder and some points in South Louisiana beyond De Ridder, and there was no substantial evidence of any public need nor requirement for even any additional service between Lufkin and South Louisiana points via De Ridder; and (4) The hearing before the Interstate Commerce Commission developed that the application was in reality an effort of the applicant Herrin to set up a new motor carrier service between Dallas and Shreveport via Lufkin; and there was no evidence before the Interstate Commerce Commission with respect to any need nor requirement for any service between Dallas and Shreveport, and the evidence before the Interstate Commerce Commission is undisputed that the existing carrier service between Dallas and Shreveport is adequate to meet the public needs and convenience and that there is no necessity for the additional service authorized to the applicant between such places.

The real purpose of the application is illustrated by the testimony of Herrin's General Manager in the record before the Interstate Commerce Commission at the near outset of the hearing thereon: (S. M. 13)

> "Q. What is the Herrin Transportation Company Seeking to do, Mr. Daigle, by reason of this application, insofar as the town of Lufkin is concerned?
>
> "A. We are seeking to make Lufkin, Texas, a point of interchange, a common point, make it a part of our operation. We pick up freight at Dallas or Fort Worth that we can haul that freight over the highway via Lufkin, and turn North into Shreveport, instead of hauling it all the way into De Ridder, Louisiana, and North to Shreveport."

No other statement appears in the record before the Interstate Commerce Commission as to the purpose of the application.

Under the Interstate Commerce Commission's order complained of, Herrin would be permitted to handle traffic moving to, from and through Dallas, on the one hand, and to, from and through Lufkin, on the other, and by having such authority to serve Lufkin would likewise be authorized to use Lufkin as a common service point to its operation between Houston and Shreveport, generally over U. S. Highway No. 59, thus being able to handle such traffic moving to, from and through Dallas, on the one hand, and to, from and through all points in Eastern Texas located on its route extending through Eastern Texas from Houston to Shreveport, even though there is *no* evidence relating to need for such service by Herrin. There are three motor carriers, namely East Texas Motor Freight Lines, Red Ball Motor Freight, Inc., and Southwestern Transportation Company rendering daily service between Dallas and Lufkin with many schedules, and all of these carriers maintain agency depots, pick-up and delivery service and full carrier terminal facilities at Lufkin. East Texas Motor Freight Lines serves all the points on Herrin's route in Eastern Texas south of Lufkin to Houston and Red Ball Motor Freight, Inc. serves all the points in Eastern Texas on Herrin's Houston-Shreveport Line. These carriers, East Texas Motor Freight Lines, and Red Ball Motor Freight, Inc., have been providing this service between Dallas and these towns. Herrin presented no witnesses to testify with regard to Dallas, Lufkin, or any place on its Houston-Shreveport line, and in no way contended that the services of appellants between Dallas and any place on its route in Eastern Texas, including Lufkin, was inadequate or unsatisfactory.

Herrin presented the testimony of its operating witness and that of 6 public witnesses, and of the latter, three testified with regard to DeRidder and three with regard to New Orleans, but a consideration of the record reveals that even such testimony was not substantial. Those were the only public witnesses offered: those testifying relating to traffic moving between Lufkin, on the one hand, and DeRidder and New Orleans on the other hand.

The basis upon which the Interstate Commerce Commission apparently predicated its erroneous orders is contained in the order of September 19, 1949, after pointing out that Herrin's then operations between Dallas and Shreveport were from Dallas to DeRidder, Louisiana, thence to Shreveport, Louisiana:

> "Despite the circuity of this route, applicant appears to be able to compete effectively with short-route carriers. By using Lufkin as an intermediate point (which affords it a saving of 148 miles) applicant would still give only an overnight service. It would, however, be in a position to conduct its operations between Dallas and Shreveport on a more convenient and economical basis. It is not apparent that operations by Lufkin would necessarily or materially enhance applicant's present competitive position with the opposing carriers."

Such finding is unsupported by the evidence, for applicant's General Manager testified that he was not familiar with the approximate volume of traffic presently being handled over the route and thus could not testify that it is able to effectively compete, and in light of the testimony of appellants' operating witnesses it is clear that the granting of the short route would place Herrin in a competitive advantageous position.

1. There being no evidence of additional service needed between Dallas and Lufkin, and points beyond Lufkin such

as Shreveport, there can be no inference of substantial evidence with respect thereto.

2. The evidence between Lufkin, on the one hand, and DeRidder and New Orleans on the other hand, being unsubstantial in nature, will not afford a basis for the grant of authority between such points.

3. Assuming the substantial nature of the evidence between Lufkin, on the one hand, and DeRidder and New Orleans, on the other hand, such evidence cannot be imputed to another route and between other points such as between Dallas and Lufkin, and points beyond Lufkin such as Shreveport.

4. Since Section 207 of the Interstate Commerce Act requires a finding that the public convenience and necessity requires such service as a prerequisite to the grant of authority, the need therefor cannot be presumed.

5. Where no showing is made with respect to the volume of tonnage presently being transported, and existing carriers then adequately serving the territory establish that the granting of a proposed application would have a material ill-effect upon them because of a competitive advantage to result to an applicant, the Interstate Commerce Commission cannot presume that the granting of such application would not have a material ill-effect upon existing carriers then operating over the involved route.

6. Where a carrier operates between two points over a route approximately 150% circuitous of a proposed route and there is no showing of the volume of the traffic being transported by such carrier over the circuitous route, but there is a showing that existing authorized carriers are effectively operating over the proposed route, the Interstate Commerce Commission transcends the bounds of propriety and is arbitrary in concluding that such service as proposed would not be a new service but would be in

fact an improved service. Under such circumstances, such an applicant is required to establish by the burden of proof that the public convenience and necessity requires the proposed service, and it cannot be presumed so.

It is submitted that the decision of the District Court fails to recognize the failure of Herrin to establish by substantial evidence the need for service between Dallas and Lufkin (and points beyond, including Shreveport) and that the burden is placed upon an applicant under Section 207 of the Interstate Commerce Act, as amended, to establish that the public convenience and necessity requires a proposed common carrier motor carrier service as a prerequisite to the grant of authority, and that no presumption of such requirement can be made.

Respectfully submitted,

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EXHIBIT A

[Title omitted]

Davidson, District Judge; Hutcheson, Chief Judge, concurring:

This is an action brought by plaintiffs to set aside an order of the Interstate Commerce Commission granting a certificate of public convenience and necessity to a common carrier by motor vehicle covering the transportation of commodities in interstate and foreign commerce.

A permanent injunction, restraining the enforcement, operation and execution of the order of the Interstate Commerce Commission is sought; thus, the cause is one required to be heard by a District Court of three judges under 28 USCA 2284.

Herrin had sought, before the Interstate Commerce Commission authority, to serve Lufkin as an intermediate point for several reasons, the principal being to permit a more direct route of its traffic moving between Dallas and Shreveport, such traffic being, at the time of application for such order, between Dallas and Shreveport by the way of De Ridder, a distance of some 454 miles. By using Lufkin as an intermediate point instead of going to De Ridder and back to Shreveport, the distance would be cut to 306 miles, or 148 miles less than the former route by De Ridder.

The question that confronts the Court at the threshold of the case is, how far may a Court go in setting aside the finding of an administrative body clothed with fact finding and quasi judicial powers incident to the administration of its service?

Proposition: A Court may not set aside the orders of a fact finding, administrative body, acting within the field of its designated powers, unless such order is illegal, capricious, or unsupported by fact.

This rule is applicable in Texas, as illustrated by orders of a County Commissioners Court when a review thereof is sought in the State District Court.

It is applicable to executive branches of the United States Government. Illustration: The Postal Department. The Postmaster, for instance, is charged with the duty of classifying the mail in four piles or groups, and when he has so acted, the Court will not reclassify it unless he has acted capriciously or without warrant of law or fact. 255 U. S. 407. *Milwaukee Publishing Company* v. *Burleson*, 229 U.S. 288, *Lewis Publishing Company* v. *Morgan*.

This rule applies with even greater force to the findings of the Interstate Commerce Commission, because of the very nature and purpose of its creation.

> "The purpose of Congress was to leave the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity * * * this of course gives administrative discretion to the Commission * * * to draw its conclusion." 283 U. S. 35, *Chesapeake & Ohio Railway Co.* vs. *United States*, 300 U. S. 276-287, *Powell* vs. *United States*, *McLean Trucking Co.* vs. *United States*, 321 U. S. 67.
>
> "Unless in some specific respect there has been prejudicial departure from requirements of the law, or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done." *United States* vs. *Pierce Auto Line*. 327 U. S. 515-536.

Authorities touching upon this phase of the law have been so fully and thoroughly discussed in 75 Fed Sup 915, *Lang Transportation Corporation* vs. *United States* that we adopt, in part, the reasoning of Judge O'Connor in said case:

> "The Commission is the guardian of the public interest in determining whether certificates of conven-

ience and necessity shall be granted. For the performance of that function with the Commission has been entrusted with a wide range of discretionary authority, *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65 S. Ct. 1490 (89 L. Ed. 2051). *Its function is not only to appraise the facts and to draw inferences from them, but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies.* (Emphasis supplied)."

"We think the court misconceived not only the effects of the Commission's action in these cases, but also its own function. • • • Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing Court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination."

(Note: See also *McCracken* v. *United States*, 47 Fed. Sup. 447; *A. B. & C. Motor Transport* vs. *United States*, 69 Fed. Sup. 166. *Beard-Laney* vs. *United States*, 83 Fed. Sup. 27; *C. E. Hall & Sons* vs. *United States*, 88 Fed. sup. 596 at 601.)

It should not be overlooked that the functions of the Interstate Commerce Commission in regulating tariffs and lines of transportation are as much concerned with the affairs and well-being of the general public as they are with the transportation companies and their competitive controversies. The Interstate Commerce Commission had, after due hearing, granted a certificate to the defendant Herrin Transportation Company. We think the evidence attending the circumstances of granting such certificate may be tersely stated as follows:

The twofold effect of such certificate is that the carrier (1) is authorized to transport freight between Dallas and

Shreveport through Lufkin as an intermediate and common point on its respective authorized routes between Corsicana and De Ridder and between Houston and Shreveport, and (2) is authorized to transport freight directly between Lufkin and De Ridder, instead of having to move same over a much longer and circuitous route.

The complainants herein challenge the action of the Commission in its entirely, but the stoutest attack is against the refusal of the Commission to retain the restriction against traffic between Dallas and Shreveport, as recommended by the examiner.

The short line route between Dallas and Shreveport is over Highway 80 and the distance is about 185 miles. The D. C. Hall Transport, Inc., the Texas & Pacific Motor Transport Company and the East Texas Motor Freight Lines, motor common carriers, all hold certificates antedating the one in question issued to Herrin, authorizing them respectively to transport freight between Dallas and Shreveport, over the said short line route, and each of said companies was at all pertinent times and still is engaged in said business. The Texas & Pacific Railway Company for many years has been doing business as a common carrier of freight by railroad between Dallas and Shreveport, a distance of about 185 miles by its line. The Southwestern Transportation Company held a certificate, antedating the certificate now in question, authorizing it to transport freight between Dallas and Shreveport over a route of about 195 miles, and it was at all pertinent times and still is engaged in such business as a motor common carrier.

The distance of the Herrin route from Dallas to De Ridder to Shreveport is 454 miles. The distance of its route from Dallas to Lufkin to Shreveport is 306 miles.

The plaintiffs in the case, seeking to set aside the Commission's order, have the right and the privilege of trans-

porting freight directly from Dallas to Shreveport at a distance of less than 200 miles. The order complained of allows Herrin to transport freight to Shreveport by the way of Lufkin, a distance of more than 300 miles. We do not see how the competing lines, appearing as complainants, can be greatly injured by a competitor working under this handicap. It will, however, be a convenience to the defendant Herrin to be able to shorten his route to Shreveport by turning at Lufkin instead of continuing on to Shreveport by the way of De Ridder, Louisiana, as had previously been done.

The Court doesn't feel called upon to substitute its judgment for that of the Commission. It does find that the Commission was acting without any unreasonable abuse of its discretion and that there were adequate facts to support its findings.

/s/ T. Whitfield Davidson
United States District Judge

Opinion of Judge Dooley
Filed December 30, 1950.

(Title Omitted)

Dooley, District Judge, Dissenting:

The complainants, Red Ball Motor Freight, Inc., D. C. Hall Transport, Inc. and East Texas Motor Freight Lines, corporations, sue the United States of America, the Interstate Commerce Commission and Herrin Transportation Company, a corporation, to enjoin, annul and set aside a report and order of the Interstate Commerce Commission and a later order of the Commission overruling petitions for reconsideration, rendered September 19, 1949 and may 4, 1950, respectively, and to enjoin the operations of Herrin

conducted under such orders, and a three judge court was convened herein under Article 28 U. S. C. 2284.

On September 18, 1942, the Commission granted to Herrin a certificate of public convenience and necessity authorizing it to engage in the transportation of general commodities, subject to certain exceptions, as a common carrier by motor vehicle in interstate or foreign commerce, (1) between Houston, Texas and Shreveport, Louisiana, over a specified route, and service was authorized thereunder at Lufkin, Texas, as an intermediate point, and (2) between Galveston, Texas and Fort Worth, Texas over a specified route through Corsicana, Texas and Dallas Texas.

On January 18, 1943 the Commission granted to Herrin a certificate of public convenience and necessity authorizing it to engage in the transportation of general commodities, subject to the same exceptions, as a common carrier by motor vehicle in interstate or foreign commerce, between Corsicana, Texas, through Lufkin, Texas to De Ridder, Louisiana, over a specified route, but with a restriction of service at De Ridder to traffic moving to and from Merryville, Louisiana and Dallas, and points beyond Dallas, said restriction being in part a bar to service at Lufkin, but the carrier was entitled to tack at Corsicana with its other regular route aforesaid, over the segment thereof between Corsicana and Dallas, and thus render transportation service between Dallas and De Ridder.

Later Herrin for a time, although Lufkin was not a service point on its Dallas to De Ridder authorized route, presumptuously engaged in the carriage of freight both ways over its said route from Dallas to Lufkin and thence over its other route to Shreveport, until a ruling by the Commission that it had no rightful authority to handle such traffic under the terms of its second aforesaid certificate.

In 1946 Herrin filed an application for a certificate authorizing it to transport freight as a common carrier by motor

vehicle between Dallas and Shreveport, on the short route over Highway 80, but said application was denied January 14, 1948, and the adverse decision thereon rendered by Division 5 of the Commission, in the part particularly significant presently, reads as follows:

"In support of the application, applicant relies on evidence purporting to show certain operating economies and increased efficiency which will result in its operations by use of the proposed route between Dallas and Shreveport as it is 161 miles shorter than the more circuitous route through Corsicana and Lufkin over which applicant has been operating. * * * No shipper witnesses appeared in support of the application and there is no evidence that the shipping public requires any additional service. Existing carriers should be accorded the right to transport all traffic which, under normal conditions, they can handle adequately, efficiently and economically in the territory served by them before a new operator is permitted to enter the field in competition with them. We find that applicant has failed to show that the present or future public convenience and necessity require the proposed operation, and the application should be denied."

A few days before the adverse decision last mentioned, Herrin on December 22, 1947 filed with the Commission an application for a certificate authorizing it to also serve Lufkin as an intermediate point in transporting freight as a common carrier on its existing route between Corsicana and De Ridder. This application was referred to a Joint Board, but it waived participation, and hearings were held by an examiner of the Commission. He filed his report, together with a recommendation that a certificate amendment be issued authorizing the addition of service at Lufkin on the already authorized route between Corsicana and De Ridder, but restricted against traffic moving between Dallas and

Shreveport. The Commission, by Division 5 decided, with two commissioners agreeing and the other commissioner dissenting, that the examiner's proposal to restrict traffic between Dallas and Shreveport was not well advised, and that the application should be in all things granted. The full Commission denied a reconsideration of said action. These proceedings are the same noted more briefly in the first paragraph hereof. Thereafter on July 3, 1950, and in conformity with its said rulings, the Commission issued to the applicant Herrin the certificate now in question.

The short line route between Dallas and Shreveport is over highway 80 and the distance is about 185 miles. The D. C. Hall Transport, Inc., the Texas & Pacific Motor Transport Company and the East Texas Motor Freight Lines, motor common carriers, all hold certificates antedating the one in question issued to Herrin, authorizing them respectively to transport freight between Dallas and Shreveport, over the said short line route, and each of said companies was at all pertinent times and still is engaged in said business. The Texas & Pacific Railroad Company for many years has been doing business as a common carrier of freight by railroad between Dallas and Shreveport, a distance of about 185 miles by its line. The Southwestern Transportation Company holds a certificate, antedating the certificate now in question, authorizing it to transport freight between Dallas and Shreveport over a route of about 195 miles, and it was at all pertinent times and still is engaged in such business as a motor common carrier. The Sproles-Red Ball Lines, Inc. held and its successor Red Ball Motor Freight, Inc. has since held a certificate, antedating the certificate in question authorizing said holders successively to transport freight between Dallas and Shreveport over a route about 220 miles long, and said holders successively and respectively did at all pertinent

times and said successor still does engage in such business as a motor common carrier.

The distance of the Herrin route from Dallas to De Ridder to Shreveport is 454 miles. The distance of its route from Dallas to Lufkin to Shreveport is 306 miles. Herrin took about 14 hours in transporting any freight between Dallas and Shreveport over its said route through De Ridder. The record does not show how long is required for the haul over Herrin's last authorized route between Dallas and Shreveport through Lufkin, but evidently the time would be around 9 hours. Five of the competing carriers named above take only 4½ to 6 hours and the other one of said competing carriers takes about 7 hours, for their respective schedule between Dallas and Shreveport. The said competing carriers were and are experienced and capable companies, well able to adequately and satisfactorily handle all freight traffic between Dallas and Shreveport.

There is no substantial evidence in the record that the Herrin Transportation Company was an effective competitor in its bid for a part of the freight traffic between Dallas and Shreveport when it had to transport same over the circuitous route through De Ridder. The record is simply silent as to any measure of such traffic either in tonnage or revenue nor is there any kind of a traffic study exhibit. This lack of evidence is no oversight on the part of Herrin. Its general manager testified, and on cross-examination had this feature brought to his attention pointedly, as reflected in a question and his answer noted in the margin,[1] but

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[1] "Q. Are you familiar with the approximate volume of traffic that you are presently handling over that route?

"A. No sir, I don't believe I could give you an estimate on that. It is intermingled with Mansfield; we serve a lot of local points between Shreveport and De Ridder, Leesville, Mansfield, and so forth."

nothing was done towards providing such data for the record.

On the other hand, there is specific testimony in the record tending to negative any such effective competition.[2] The picture of this record is that Herrin was content to pass by the practical criteria which would shed light on the effectiveness of its competition in handling traffic between Dallas and Shreveport over its roundabout route through De Ridder. This information was peculiarly within its own knowledge. It presumably would have shown the facts if same were helpful, and the failure to turn a hand in that behalf justifies an inference that the facts would not have disclosed effective competition. The action of Herrin in venturing to carry freight for a time without right between Dallas and Shreveport via Lufkin, and its application for

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[2] An agent of the Southwestern Transportation Company, one experienced in the solicitation of motor freight business, testified as follows:

"Q. Have you found you are able to secure freight traffic more readily for movement over a direct short route than over a circuitous route between two points?

"A. Yes."

The general manager of the D. C. Hall Transport, Inc. testified as follows:

"Q. Do you consider the service of Herrin Transportation Company from Dallas to Shreveport via De Ridder, Louisiana, competitive with your service?

"A. Only to a very, very slight degree. Over that route most of the business they can't get, and a lot more they couldn't afford to take because the cost would exceed their revenue."

The Vice-President of the East Texas Motor Freight Lines testified as follows:

"Q. Is Herrin Transportation Company one of the carriers which is competing with you in the handling of Dallas-Shreveport traffic?"

"A. No sir. I shall say this: I understand they do have operating rights into Shreveport via De Ridder.

"Q. I am talking about actually handling traffic?

"A. I have not encountered any competition whatsover.

"Q. And do you consider Herrin Transportation Company a competitor in the Dallas-Shreveport traffic?

"A. No sir, I do not."

a certificate authorizing a short line route between Dallas and Shreveport which was denied by the Commission, tend to show that it was not effectively competing over the long route through De Ridder, but that it had a persistent design to put itself in position for effective competition. This question of effective competition is a highly important point in the litigation. The key finding contained in the report of the Commission, Division 5, bears this out clearly.[3] In other words such effective competition precedent was a prerequisite to the certificate in question. The Commission in said report recites that Herrin was already giving overnight service on its route between Dallas and Shreveport through De Ridder. This implies that "overnight" has a broader meaning in transportation parlance than its dictionary definition for on a 14 hour schedule the trip could not be made during the 12 hours commonly regarded as the night time. On the other hand all of its competitors required only about half of the night time hours for transportation between Dallas and Shreveport. The fact seems to be that so far from being able to closely compete in overnight service between said points Herrin ordinarily had a schedule of 2 or 3 o'clock P.M. out of Dallas destined to Shreveport,[4] and this apparently left it out of the competi-

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[3] "As stated applicant is presently affording an overnight service between Dallas and Shreveport, via De Ridder, a distance of about 454 miles. Despite the circuity of this route applicant appears to be able to compete effectively with short route carriers. By using Lufkin as an intermediate point (which affords it a saving of 148 miles) applicant would still give only an overnight service. It would, however, be in a position to conduct its operations between Dallas and Shreveport on a more convenient and economical basis. It is not apparent that operations via Lufkin would necessarily or materially enhance applicant's present competitive position with the opposing carriers."

[4] The general manager of Herrin testified as follows:

"Q. What time does your truck ordinarily leave Dallas destined for Shreveport?

"A. Well, ordinarily on the loads he may leave at 2:00 o'clock in the afternoon, or 3:00 o'clock in the afternoon."

tion for late night shipments moving either way between Dallas and Shreveport. Obviously Herrin made any next morning deliveries between Dallas and Shreveport only on early or middle afternoon departure schedules, but of course with the certificate in question it now can maintain a true overnight schedule with late night departures and next morning deliveries and by said transition, but only by virtue thereof, becomes a full fledged competitor on substantially equal terms with the other carriers engaged in the freight traffic between Dallas and Shreveport. In other words, by the authority of the certificate in question, opening the route from Dallas to Lufkin to Shreveport, Herrin realistically is now rendering a new transportation service. In defense thereof Herrin can point only to its operating economies and efficiencies under the new dispensation to support a finding of public convenience and necessity, and that is not enough under the rule of the Commission.[5] The record here does not sustain the Commission in discarding the recommendation of the Examiner that Herrin's certificate amendment should be restricted against traffic between Dallas and Shreveport.

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[5] "Here, applicant seeks authority to transport Memphis-Alexandria traffic over a 417 mile route in lieu of his present authorized routes, of 523 and 571 miles, which can no longer be used because they are unduly circuitous. The proposed operation involves reduction of over 100 miles in distance and over 3 hours in transit time with a resultant change in delivery time from first afternoon to first morning. Under this proposal, applicant could resume a service between Memphis and Alexandria over a much shorter route than those he formerly used and thus become a real competitor of existing carriers having direct routes between these points. Considering these circumstances, we conclude that applicant's proposed operation is tantamount to a new service. To justify this operation, applicant relies solely on evidence of operating economies and efficiencies. Such evidence has been found sufficient justification for a finding of public convenience and necessity, in a proper case. See Dixie Ohio Exp. Co. Extension of Operations—Bristol, 30 M. C. C. 291. It is not sufficient in the instant case because the proposed operation is tantamount to a new service." David C. Hall Extension of Operations—Brookhaven, Miss., 44 M. C. C. 104.

The scope of judicial review in cases of this kind is definitely defined in imperative words by statute.[6] This dissent goes only to that part of the Commission ruling as to the Dallas-Shreveport operation. The record is conspicuously meager on that part of the application. The only relevant showing thereon is certain evidence that Herrin had hauled some freight from Dallas to Shreveport via De Ridder, the volume or revenue undisclosed either exactly or approximately, and that authority to travel the shorter route via Lufkin would be advantageous in economy and efficiency for Herrin. No one testified that there was the slightest need on the part of the public for such additional service, nor that the service of the other carriers already handling traffic over the still shorter route directly between Dallas and Shreveport was inferior or unsatisfactory or inadequate in any way. This situation recalls strongly the case of I. C. C. vs. Parker, 326 U. S. 60, where the minority in their dissent protested any supposition that "railroad convenience and necessity" rather than "public convenience and necessity" was the lawful standard. The Commission itself is authority for the principle that gains in economy and efficiency derived by a carrier, standing alone, under circumstances comparable with this record, are insufficient to support a finding of public interest and convenience, as seen in the already cited case of David C. Hall Extension of Operations—Brookhaven, Miss., 44 M. C. C. 104.

It seems to me that many telling circumstances stand arrayed in this record against the decision of the Commission. In the first place there has been a rather remarkable diversity of opinion encountered in the progress of this case as same has been heard first by the Examiner, next by

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[6] "It (court) shall * * * hold unlawful and set aside agency action, findings and conclusions found to be * * * (5) unsupported by substantial evidence * * *". U. S. C. Title 5. Sec. 1009 (e).

Division 5 of the Commission, and now by this Court. The Examiner concluded that the record did not justify the application as to the Dallas-Shreveport operation. One of the three commissioners of Division 5 took the same view Now one of the members of this Court is of the same mind. Such a persistent dissent, though conclusive of nothing, at least tends to raise a cloud of fair doubt about the ruling in this case. The failure of the applicant to present any clear cut proof, which it could have done if the fact had been that way, that it had been able to compete effectively in the Dallas-Shreveport traffic on its old and circuitous route from Dallas to De Ridder to Shreveport, tends to reinforce said doubt. The fact that in 1948 the Commission held that the public interest and convenience did not justify the Herrin application then pending for a certificate to operate between Dallas and Shreveport over the direct and short route, a distance materially shorter than the route afterwards authorized and now in question from Dallas to Lufkin to Shreveport, that is a denial of public interest and convenience that time in contrast with the finding of public interest and convenience this time, tends further to confirm such doubt.

Unquestionably the Commission is entrusted with great authority under the law, including a range of discretionary judgment, and judicial review is much limited, but after all is said and done the Commission does not have and Congress never intended that it should have an entirely free rein. It obviously lacks the power to make gossamer findings. The minimum prerequisite of the law is "substantial evidence", and the courts stand as guardians against any deviation from that standard. The responsibility of the courts positive, and calls for careful scrutiny in reviewing actions of the Commission. The majority of this Court hold, as I understand it, that the evidence in the record supports the

findings of the Commission that Herrin, using its preexisting route from Dallas to De Ridder to Shreveport, over 450 miles long, was already an effective competitor of the complaining short line carriers, using a route less than 200 miles long, in the Dallas-Shreveport traffic carriage, at the time its application in question was filed, and that the public interest and convenience was served in the grant of said application authorizing the applicant to use the intermediately shorter route from Dallas to Lufkin to Shreveport. It is to be noted however that the majority opinion herein does not put a finger on any particular or specific evidence in the record supposed to support such findings of the Commission. My analysis of the record as to the Dallas-Shreveport operation is that the Commission clearly crossed the line between substantial evidence and scintilla evidence, and that such lapse calls for the relief which the courts have frequently granted in defending the "substantial evidence" requirement.[7]

On the other hand the action of the Commission in opening the way for Herrin to handle freight moving from De Ridder and other points in that territory to Lufkin and moving from Lufkin to De Ridder, over its direct short route, is sufficiently supported by the record. The said short route is only about 110 miles in length, yet as things formerly stood such freight shipments had to go by a round-about route and on a second morning delivery schedule. This obviously was slow service and the handling has now been greatly expedited. For instance the trip is now easy for

[7] Baltimore & Ohio Railroad Co. vs. United States (The Chicago Junction Case), 264 U. S. 258; Alton Railroad Co. vs. United States, 315 U. S. 15; United States vs. Carolina Freight Carriers Corporation, 315 U. S. 475; Hudson Transit Lines, Inc. vs. United States, 82 Fed. S. 153; Interstate Common Carrier Council vs. United States, 84 Fed. S. 414; Swedesboro Transportation Co. vs. United States, 45 Fed. S. 33; Erie Railroad Co. vs. United States, 59 Fed. S. 748; Inland Motor Freight vs. United States, 60 Fed. S. 520.

overnight transportation. The pertinent finding by the Commission is quoted in the margin.[8] It was well within the authority of the Commission under this record to make the finding that provision for said service was called for by public convenience and necessity, and I fully concur that far with the other members of the Court.

Much of the most of this record consists of the evidence presented in support of the strong part of the application for an amended certificate, that is the part dealing with the question of authority to use the applicant's existing direct route in handling traffic between Lufkin and De Ridder and points in that general section, but at the same time it seems quite probable that the applicant puts far more store in that part of its application seeking authority to handle freight between Dallas and Shreveport via Lufkin. This seems almost manifest from testimony given by the Herrin general

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[8] "As shown, applicant now has authority to serve Lufkin as an intermediate point in connection with its authorized regular-route operation between Houston and Shreveport. It possesses authority to handle traffic moving between Lufkin, on the one hand, and, on the other, De Ridder and certain other southeastern Louisiana points over routes which are somewhat circuitous. It provides a single-line service on truckload shipments between the latter described points, but shipments in less-than-truckload quantities are interchanged with connecting carriers at Shreveport, Houston and Beaumont. It also has authority to operate between Corsicana and De Ridder (through Lufkin), with service insofar as it pertains to De Ridder (and Louisiana points east thereof on applicant's routes) being restricted to traffic moving to and from Merryville and Dallas. If the requested authority is granted it would offer a direct overnight service between Lufkin and the Louisiana points whereas now second day delivery is effectuated. The supporting shippers, located at New Orleans and De Ridder, expressed a need in their respective businesses for a direct overnight service to and from Lufkin which is not now available."

manager quoted in the margin.[9] In other words there is no little plausibility in the view that paradoxically the applicant's main objective has become a satellite of its lesser objective in the hope that the weak might follow in the train of the strong. In my opinion the two should be put asunder. The ruling of the Commission on the Dallas-Shreveport operation should be vacated but on the Lufkin-De Ridder operation should be sustained.

/s/ Jos. B. Dooley
United States District Judge

Findings of Fact and Conclusions of Law
Filed February 8, 1951.

(Title Omitted)

The above entitled and numbered action having come on to be heard on November 6, 1950, before a duly constituted district court of three judges established pursuant to 28 U. S. C. 2321-2325 and 2284, and all parties being represented by counsel, and the cause having been submitted upon final hearing, and the Court having taken the cause under advisement and considered the pleadings, the evidence, the argument and briefs of counsel, and the Court being fully advised in the premises now makes the following findings of fact and conclusions of law.

Findings of Fact

1. This is a suit by the above mentioned three corporations to enjoin, annul and set aside the report of the Interstate

[9] "Q. What is the Herrin Transportation Company seeking to do, Mr. Daigle, by reason of this application, insofar as the town of Lufkin is concerned?

"A. We are seeking to make Lufkin, Texas, a point of interchange, a common point, make it part of our operation. We pick up freight at Dallas or Forth Worth so that we can haul freight over the highway via Lufkin, and turn north into Shreveport, instead of hauling it all the way into De Ridder, Louisiana and north to Shreveport."

Commerce Commission, Division 5, of September 19, 1949, and the order of the Interstate Commerce Commission of May 4, 1950, granting the application of Herrin Transportation Company, a corporation, to operate as a common carrier by motor vehicle of general commodities, with certain exceptions, serving Lufkin, Texas, as an intermediate point, in connection with its presently authorized regular route.

2. On December 22, 1947, Herrin filed application for a certificate of public convenience and necessity authorizing services at Lufkin, Texas, as an intermediate point, in connection with its previously authorized regular route operated between Corsicana, Texas, and De Ridder, Louisiana. Herrin also holds operating authority to transport general commodities with certain exceptions, over numerous regular routes in Texas and Louisiana, generally, and, insofar as here pertinent, (1) between Houston and New Orleans, Louisiana, (2) between Houston and Shreveport, Louisiana, serving Lufkin as an intermediate point, (3) between Corsicana and De Ridder, serving Merryville, Louisiana, as an intermediate point, with service at De Ridder restricted to traffic moving to and from Merryville and Dallas, Texas, and points beyond Dallas, with service, so far as here relevant, authorized to and from Dallas and Houston, and (4) between Lake Charles, and Shreveport, Louisiana (through De Ridder).

3. The Commission had before it substantial evidence in support of its findings; and this Court adopts as its own the statements and findings set forth in the Commission's said report.

Conclusions of Law

Upon the foregoing facts, the Court makes the following conclusions of law:

1. This Court has jurisdiction of this cause and of the parties thereto.

2. The Commission had jurisdiction over the proceedings wherein the said report of September 19, 1949, and order of May 4, 1950, were made, and had jurisdiction to make said report and order.

3. The Commission was justified in finding in Docket No. MC-1124-(Sub-No. 61) that public convenience and necessity required operation by Herrin Transportation Company as a common carrier by motor vehicle of general commodities, with certain exceptions, serving Lufkin, Texas, as an intermediate point, in connection with its presently authorized regular route.

4. Said report and order were within the statutory authority of the Commission and were not arbitrarily or capriciously made or based upon mistake of law or misapplication of proper statutory standards. Said report and order were made by the Commission after full hearing, upon adequate findings supported by substantial evidence, and in accordance with the applicable law, and were valid and lawful in all respects.

5. The relief prayed for in the complaint is denied, and the complaint dismissed, plaintiffs to pay the costs.

JOSEPH C. HUTCHESON, JR.
U. S. Circuit Judge
United States Court of Appeals
Fifth Circuit

Dated this 7th day of February, 1951.

T. WHITFIELD DAVIDSON
U. S. District Judge
Northern District of Texas

Dissent:

JOS. B. DOOLEY
U. S. District Judge
Northern District of Texas

EXHIBIT B

Applicable Statutes

Section 206, Interstate Commerce Act, as amended (Title 49, U. S. Code, Section 306):

"(a) Except as otherwise provided in this Section and in Section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided however, That subject to Section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in Paragraph (b) of this Section and within 120 days after this Section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a) of this part and such certificates shall be issued or denied

accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operations solely within any state to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such state if there be a board in such state having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

"(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of Paragraph (a) of this Section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this Section takes effect may continue such operation for a period of 120 days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operations until otherwise ordered by the Commission."

Section 207 (a), Interstate Commerce Act, as amended (Title 49, U. S. Code, Section 207 (a)):

"(a) Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the

requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Section 10 (e), Administrative Procedure Act (Title 5, U. S. Code, Section 1009):

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning for applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside any agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise review on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed.

This is a direct appeal from the final judgment entered on February 7, 1951, by a district court of three judges specially constituted pursuant to 28 U.S.C. 1253, 2284 and 2325, dismissing appellants' complaint which sought to set aside an order of the Interstate Commerce Commission. Appeal was allowed March 28, 1951, and appeal papers were served on the Attorney General of the United States on April 2, 1951, and on the Interstate Commerce Commission on April 3, 1951.

On December 22, 1947, Herrin Transportation Company filed an application with the Interstate Commerce Commission under Section 207 of the Interstate Commerce Act (49 U.S.C. 307) for authority to operate as a common carrier by motor vehicle of general commodities, with certain exceptions, serving Lufkin, Texas, as an intermediate point in connection with its presently authorized regular route. Following hearings, Division 5 of the Commission on September 19, 1949, issued its report finding that public convenience and necessity required the granting of the authority sought and that Herrin was fit, willing and able properly to perform the service authorized. On May 4, 1950, the full Commission issued an order denying appellants' petition for reconsideration of the ruling by Division 5, and on June 30, 1950, appellants instituted the present action to set aside the report

of Division 5 and the Commission's order denying reconsideration.

The facts relevant to the Commission authorization assailed in this proceeding may be briefly summarized. Herrin Transportation Company (hereafter referred to as Herrin) holds certificates authorizing it to transport, as a common carrier by motor vehicle, general commodities over numerous regular routes in Texas and Louisiana. Of such routes, those pertinent to this proceeding are: (1) between Houston, Texas, and Shreveport, Louisiana; (2) between Dallas, Texas, and De Ridder, Louisiana; and (3) between Shreveport and De Ridder. Routes (1) and (2) cross at Lufkin, Texas, which is an intermediate point on the Houston-Shreveport route but not on the Dallas-De Ridder route.

Herrin was thus authorized to operate routes on the three sides of the triangle formed by Lufkin, Shreveport and De Ridder. But because Lufkin was not an intermediate point on the Dallas-De Ridder route, Herrin could not carry goods directly between De Ridder and Lufkin, but had to transport via the other two sides of the triangle, i.e., De Ridder-Shreveport and Shreveport-Lufkin. For the same reason, on shipments between Dallas and Shreveport, Herrin could not carry goods directly between Lufkin and Shreveport, but had to transport via the other two sides of the triangle, i.e., Lufkin-De Ridder and De Ridder-Shreveport.

When the Commission granted Herrin's request that Lufkin be made an intermediate point on its Dallas-De Ridder route, this cut Herrin's time for transporting goods between De Ridder and Lufkin

from 48 hours to an overnight run, and it shortened Herrin's route on goods transported between Dallas and Shreveport by 148 miles. But while the authorization reduced Herrin's route on Dallas-Shreveport traffic from 454 miles to 306 miles, it still remained substantially longer than the routes between these points over which Herrin's competitors, the present appellants, are authorized to operate. For two of them, the authorized route is 185 miles and for the third it is 220 miles.

With respect to Dallas-Shreveport traffic, the aspect of the Commission's authorization chiefly stressed by appellants, the Commission found that Herrin had been previously providing "an overnight service," that despite the circuity of its route it had been "able to compete effectively with short-route carriers," and that use of Lufkin as an intermediate point would enable it to handle this traffic "on a more convenient and economical basis" but would not materially enhance its present competitive position. The Commission in the report by Division 5, further stated:

> Applicant seeks only authority to serve an intermediate point on its present route. * * * Where, as here, an applicant is operating over a particular route, service at intermediate points, without restriction, is normal and generally in the interest of the public and we believe should be authorized where sought, except where there is a compelling reason for denial. Such reason is not here present. Authorization to serve the sought intermediate point in the instant proceeding will result in supplying a need for prompt and efficient service to the public, and in permitting a more

> efficient and more economical use of its facilities by applicant. The latter also results in indirect benefits to the public.
>
> In view of the above discussion, we conclude that a need has been established for the proposed service, and that any diversion of traffic from the opposing carriers which, in any event, would not appear to be substantial, will be more than compensated by benefits to the public.

The district court held that there was adequate evidence to support the Commission's finding that public convenience and necessity requires service by Herrin from and to Lufkin as an intermediate point on its Dallas-De Ridder route and that the Commission's finding did not constitute an abuse of the discretion vested in it with respect to such a determination.[1]

Appellees submit that the appeal presents no substantial question. The only issue raised is the sufficiency of the evidence to support the Commission's finding of public convenience and necessity. The chief grounds for this attack are (1) that there is no evidence that the Dallas-Shreveport service furnished by carriers other than Herrin was inadequate or unsatisfactory and (2) that the Commission's finding that Herrin had previously been transporting goods between Dallas and Shreveport lacks requisite evidentiary support.

The short answer to the first contention is that Section 207(a) requires only a showing that the proposed service is or will be needed and convenient to the public. In this connection, adequacy of existing service is a relevant but not a controlling

[1] District Judge Dooley dissented from the court's holding.

factor. Here the question is whether the public interest will be served by permitting a carrier to utilize its existing authorized routes in the most economical and efficient way, and evidence or a finding that the service of other carriers is inadequate is not a condition precedent to determination by the Commission that full utilization of existing route authorizations is in the public interest, *Beard-Laney, Inc.* v. *United States,* 83 F. Supp. 27, 32 (E.D.S.C.), affirmed 338 U.S. 803; *Hall & Sons, Inc.* v. *United States,* 88 F. Supp. 596, 601 (D. Mass.).

Clearly the Commission did not transcend its authority in determining that in this case the decisive consideration was that unrestricted service at intermediate points "is normal and generally in the interest of the public" and should be authorized in the absence of "a compelling reason for denial." The action of the Commission came well within the scope of its authority. As one of many judicial statements of its powers under the statute, we quote the following from *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241:

> The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies.

Appellants attack the sufficiency of the evidence to support the finding that Herrin had been providing service between Dallas and Shreveport notwithstanding the circuity of its route, and they contend, on the assumption that this finding cannot stand, that the Commission authorized a "new service" between these points rather than eliminated an unnecessary circuity in Herrin's existing service. Since the finding that Herrin had been providing service between Dallas and Shreveport has ample evidentiary support,[2] appellants can and do attack the finding only upon the ground that there was no evidence of the "volume" of such traffic transported by Herrin, a point also stressed in the dissenting opinion of the court below. How-

[2] Mr. A. E. Daigle, General Manager of Herrin, testified (Transcript 25):

Q. What is your running time between Dallas and Shreveport at the present time?

A. Well, between Dallas and Shreveport, the running time I would say is approximately 14 hours.

Q. 14 hours?

A. Yes.

Q. What time does your truck ordinarily leave Dallas destined for Shreveport?

A. Well, ordinarily on the loads he may leave at 2:00 o'clock in the afternoon, or 3:00 o'clock in the afternoon.

Mr. J. R. Warden, Chief Clerk of one of the short-route carriers which opposed Herrin's application in the hearing before the Commission, testified (Transcript 142-143):

Q. Do you consider the service of Herrin Transportation Company between Dallas and Shreveport competitive with the service performed by your companies?

A. It would be competitive, yes sir.

Exam. Borroughs: Is it competitive now? That is your question?

Mr. Hutchinson: Yes sir.

Q. (By Mr. Hutchinson) Do you consider it competitive at the present time over the routes they are presently operating?

A. Yes sir, I think it is competitive.

ever, the Commission was plainly authorized to consider that a service which was in sufficient volume to be competitive with that of the short-route carriers constituted an existing service. Lack of evidence or finding as to the precise volume of this service is therefore immaterial.

For the foregoing reasons, we submit that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

APRIL 1951.

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MAY 9 1951

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 731

RED BALL MOTOR FREIGHT, INC., ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

MOTION OF HERRIN TRANSPORTATION COMPANY TO AFFIRM

CARL L. PHINNEY,
Counsel for Appellee,
Herrin Transportation Company.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 2004

RED BALL MOTOR FREIGHT, INC., ET AL.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,
Defendants

MOTION TO AFFIRM

Appellee, Herrin Transportation Company, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the District Court be affirmed.

This is a direct appeal from the final judgment, entered on February 7, 1951, by a District Court of three judges especially constituted pursuant to 28 USC 1253, 2284 and 2385, dismissing Appellants' complaint which sought to set aside an Order of the Interstate Commerce Commission. Appeal was allowed March 28, 1951 and appeal papers were served on the attorney for Appellee, Herrin Transportation Company, on March 31, 1951. The Court granted extension of time to Appellee, Herrin Transportation Company, until April 23, 1951 to file this Motion to Affirm.

By an Application filed December 22, 1947, Herrin Transportation Company, a Texas Corporation, one of the Appellees herein and for convenience hereafter called Herrin, sought a Certificate of Public Convenience and Necessity, authorizing operations as a common carrier by motor vehicle in interstate or foreign commerce of general commodities, with exceptions, serving Lufkin, Texas as an intermediate point, in connection with its authorized regular route between Corsicana, Texas and DeRidder, Louisiana. The Application was set down for hearing before an Examiner, and at the hearing several motor carriers and one railroad company opposed the granting of the Application. In addition to the Appellants, Red Ball Motor Freight, Inc., D. C. Hall Transport, Inc. and East Texas Motor Freight Lines, the following carriers, who are not parties to this suit, also protested the granting of the Application: Southwestern Transportation Company, T. S. C. Motor Freight Lines, Inc., The Texas and Pacific Motor Transportation Company and The Texas and Pacific Railroad Company. At the time of the filing of this Application, Herrin Transportation Company was, and is now, authorized to operate among other routes between Houston, Texas and Shreveport, Louisiana via Lufkin, serving Lufkin as an intermediate point. In addition to the above, it is authorized to serve between Dallas, Texas and DeRidder, Louisiana, and between Shreveport, Louisiana and DeRidder, Louisiana. Herrin is authorized to transport, as a common carrier by motor vehicle, general commodities over numerous regular routes in Texas and Louisiana. The routes pertinent to this proceeding are:

(a) Between Houston, Texas and Shreveport, Louisiana

(b) Between Dallas, Texas and DeRidder, Louisiana

(c) Between Shreveport, Louisiana and DeRidder Louisiana

Routes (a) and (b) intersect each other at Lufkin, Texas which is an intermediate point on the Houston-Shreveport route, but is not an intermediate point on the Dallas-DeRidder route. Herrin was authorized to operate between Lufkin, Texas and Shreveport, Louisiana and between Lufkin, Texas and Houston, Texas, but because Lufkin was not an intermediate point on route (b), the Dallas-DeRidder route, Herrin could not carry goods direct between DeRidder and Lufkin, but would have to transport from DeRidder to Shreveport and from Shreveport to Lufkin. For the identical reason on shipments between Dallas and Shreveport Herrin could not serve Shreveport via Lufkin but had to transport via DeRidder to Shreveport. The Application for the Certificate involved in this proceeding was filed simply for the purpose of making Lufkin an intermediate point on its east-west route (b) as hereinabove set out.

A public hearing was held on June 18, 1948 and the Orders, Reports and Certificate were issued by the Interstate Commerce Commission to which exceptions, replies and petitions for reconsideration were filed by the parties, and as a result, the Commission issued a Certificate of Public Convenience and Necessity to Herrin to serve Lufkin as an intermediate point.

When Herrin secured a Certificate of Public Convenience and Necessity authorizing service to Lufkin as an intermediate point on its Dallas-DeRidder route, it enabled the shipping public to receive a direct, overnight service between New Orleans and DeRidder, Louisiana and Lufkin, Texas. The testimony was undisputed before the Interstate Commerce Commission and the Commission so found that:

> "Services of Herrin and T.S.C. are being utilized. The traffic is being interchanged at either Houston or Shreveport. At least two days' transit time is required on this traffic. The shippers are primarily interested

> in a faster service and the overnight, direct service proposed by Applicant is desired".

It, therefore, was apparent from the uncontroverted testimony before the Commission that on shipments between New Orleans, Louisiana and Lufkin, Texas and DeRidder, Louisiana and Lufkin, Texas also required about 48 hours by reason of the interchange at either Houston or Shreveport, and that the granting of this Application would shorten Herrin's time by enabling it to bring shipments direct from New Orleans and DeRidder, Louisiana into Lufkin, Texas. The same would be equally true on services in the reverse direction. The Commission's Order is not attacked in this connection.

Appellants strongly stress the Dallas-Shreveport traffic. As was previously pointed out, Herrin rendered an overnight service between Dallas, Texas and Shreveport, Louisiana via DeRidder, a distance of 454 miles, and the granting of the Certificate permitted Herrin to render substantially the same service, but would enable it to save approximately 148 miles. The Commission found that D. C. Hall's operation between Dallas, Texas and Shreveport, Louisiana, over U. S. Highway 80, was approximately 5½ hours and distance travelled of 185 miles. Red Ball Motor Freight, Inc. operates between Dallas and Shreveport in approximately 5½ hours and traverses about 220 miles. East Texas Motor Freight Lines operates between Dallas and Shreveport in about 6 hours and operates over about 185 miles. The Commission found that:

> "Herrin was able to compete fully with short route carriers in spite of the longer distance, and that the granting of Lufkin as an intermediate point would enable Herrin to handle this traffic on a more convenient and economical basis"

but would not materially enhance its present competitive position. The Interstate Commerce Commission found:

> "Where, as here, an Applicant is operating over a particular route, service at intermediate points, without restriction, is normal and generally in the interest of the public and we believe should be authorized where sought, except where there is a compelling reason for denial. Such reason is not here present. Authorization to serve the sought intermediate point in the instant proceeding will result in supplying a need for prompt and efficient service to the public, and in permitting a more efficient and more economical use of its facilities by Applicant. The latter also results in indirect benefits to the public.
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> In view of the above discussion, we concur that a need has been established for the proposed service and that any diversion of traffic from the opposing carriers which, in any event, would not appear to be substantial, will be more than compensated by benefits to the public".

The District Court held that it was adequate evidence to support the Commission's finding that public convenience and necessity requires service by Herrin from and to Lufkin as an intermediate point on its Dallas-DeRidder route, and that the Commission's finding did not constitute an abuse of the discretion vested in it with respect to such a determination. (District Judge Dooley dissented).

Throughout these proceedings appellants have strongly urged that the Commission was in error in not requiring Herrin to prove convenience and necessity between Dallas and Shreveport. Conceivably there could be no justification whatever for the Commission to require any testimony on convenience and necessity between Dallas, Texas and Shreveport, Louisiana for the reason that Appellee, Herrin Transportation Company, already has that authority under existing Certificates of Public Convenience and Necessity

issued by the Interstate Commerce Commission by virtue of its operations to Dallas to Corsicana to DeRidder to Shreveport. The Interstate Commerce Commission made a finding as follows:

> "As stated, Applicant is presently affording overnight service between Dallas and Shreveport, via DeRidder, a distance of about 454 miles. Despite the circuity of this route, Applicant appears to be able to compete effectively with short route carriers by using Lufkin as an intermediate point (which affords it a saving of 148 miles). Applicant would still give only an overnight service. It would, however, be in a position to conduct its operations between Dallas and Shreveport on a more convenient and economical basis. It is not apparent that operations via Lufkin would necessarily or materially enhance applicant's present competitive position with the opposing carriers."[1]

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[1] Mr. A. E. Daigle, General Manager of Herrin, testified (Transcript 25):

Q. What is your running time between Dallas and Shreveport at the present time?

A. Well, between Dallas and Shreveport, the running time I would say is approximately 14 hours.

Q. 14 hours?

A. Yes.

Q. What time does your truck ordinarily leave Dallas destined for Shreveport?

A. Well, ordinarily on the loads he may leave at 2:00 o'clock in the afternoon, or 3:00 in the afternoon.

Mr. J. R. Warden, Chief Clerk of one of the short route carriers which opposed Herrin's application in the hearing before the Commission, testified (Transcript 142-143):

Q. Do you consider the service of Herrin Transportation Company between Dallas and Shreveport competitive with the service performed by your companies?

A. It would be competitive, yes sir.

Q. (By Exam. Borroughs) Is it competitive now? That is your question.

A. (Mr. Hutchinson) Yes sir.

Q. (By Mr. Hutchinson) Do you consider it competitive at the present time over the routes they are presently operating?

A. Yes, sir, I think it is competitive.

As is pointed out in footnote 1, there is substantial evidence in the record that Herrin was an effective competitor on traffic moving between Dallas and Shreveport via DeRidder.

It is respectfully submitted that the action of the Commission in the grant of authority to Herrin was well within its statutory authority. We quote from the following opinion, *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies"

That a court may not set aside the order of a fact finding administrative body, acting within the field of its designated power, unless such order is unsupported by evidence or is illegal or capricious, is well established.

> "The purpose of Congress was to leave the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity * * * this of course gives administrative discretion to the Commission * * * to draw its conclusions." 283 U. S. 35, *Chesapeake & Ohio Railway Co.* vs. *United States*, 300 U. S. 276-287, *Powell* vs. *United States, McLean Trucking Co.* vs. *United States*, 321 U. S. 67.
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> "Unless in some specific respect there has been prejudicial departure from requirements of the law, or abuse of the Commission's discretion, the reviewing

court is without authority to intervene. It cannot substitute its own view concerning what should be done." *United States* vs. *Pierce Auto Line,* 327 U. S. 515-536.

For the foregoing reasons, we submit that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

CARL L. PHINNEY,
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Herrin Transportation Company.

(4736)

No. 731. RED BALL MOTOR FREIGHT, INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Texas. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. *Reagan Sayers* and *R. E. Kidwell* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; and *Carl L. Phinney* for the Herrin Transportation Co., appellees. Reported below: 98 F. Supp. 248.

Miscellaneous Orders